Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6521

MONICA ALDINGER,

Petitioner,

v.

MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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December 29, 1975

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Re: Monica Aldinger v. Merton L. Howard, et al.,
No. 74-6521

Dear Mr. Rodak:

Upon reading the printed copy of the petitioners brief, it appears that a number of case citations are in error.

Citations in error:	Pages affected
American Security Co. v. Shatterproof Glass Corp., 166 F.Supp. 813 (D.C. Del. 1958) Correction: American Securit Co.	ii, 15
Baltimore S.S. Co. v. Phillips, 274 U.S. 361, 41 S.Ct. 600, 71 L.Ed. 1069 (1926) Correction: 47 S.Ct. 600	ii
Beautytuft, Inc. v. Factory Insurance, Assoc., 431 F.2d 112 (6th Cir. 1970) Correction: 431 F.2d 1122	ii
Connecticut General Life Insurance Co. v. Crofton, 415 F.2d 41 (5th Cir. 1969) Correction: Craton, 405 F.2d 41	iii, 30
Fahrner v. Gentzsh, 335 F.Supp. 349 (E.D. Pa., 1972) Correction: 355 F.Supp. 349	iii
Maloney v. United States, 354 F.Supp 48 (S.D. N.Y. 1972) Correction: 354 F.Supp. 480	iv

Moor v. County of Alameda, 41 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) Correction: 411 U.S. 693	iv, 3, 5, 7

I hope that no inconvenience has been caused by the above errors.

Sincerely yours,

Norman Rosenberg
Attorney for Petitioner

NR/dr

cc: Garald Gesinger

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
ss.
COUNTY OF SPOKANE)

DEDE F. RUETSCH, being first duly sworn upon oath, deposes and says:

That on December 29, 1975, I served a true and correct manuscript copy of the letter above written upon respondents MERTON HOWARD and SPOKANE COUNTY, by depositing a copy of said document, postage prepaid, in a United States Post Office addressed to respondent's counsel of record, Donald C. Brockett, Spokane County Prosecuting Attorney. All parties required to be served have been served.

DEDE F. RUETSCH

SUBSCRIBED and SWORN to before me this 29th day of December, 1975.

Notary Public in and for the State of Washington, residing at Spokane

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the court of appeals (App. 24) is reported at 513 F.2d 1257 (1975).

The one page order of dismissal by the district court for the eastern district of Washington entered September 25, 1973 (App. 20) is unreported.

JURISDICTION

The opinion of the court of appeals for the ninth circuit was entered on April 7, 1975. A petition for a rehearing *en banc* was denied on April 7, 1975. The petition for a writ of certiorari was filed on May 12, 1975, and was granted October 6, 1975. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.S. CONST. art. III, §2:

> Jurisdiction of Courts. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .

QUESTIONS PRESENTED

Does the U.S. district court for the eastern district of Washington have the power to join a pendent state

claim that is related to an existing federal claim, when such joinder requires the inclusion of a party not otherwise subject to federal jurisdiction?

STATEMENT OF THE CASE

In August, 1971, the petitioner was unlawfully and unconstitutionally terminated from her position in the Spokane County Treasurer's Office. As a consequence, petitioner filed a civil action pursuant to 42 U.S.C. §1983 against the Treasurer of Spokane County and against the County of Spokane. The complaint (App. 12) alleged, *inter alia,* the deprivation of certain enumerated constitutional rights and also asserted pendent jurisdiction over state law claims arising out of the same incident against the defendant Spokane County.

After various pre-trial matters of no importance to the issue on review, defendant Spokane County, citing *Moor v. County of Alameda,* 41 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), moved for judgment on the pleadings (App. 15), alleging that 42 U.S.C. §1983 did not empower jurisdiction over this corporate defendant. The district court granted the motion, dismissing the federal claim against the County of Spokane. The federal claim against the Treasurer, however, remained.

In granting the motion to dismiss, the district court ruled that it did not have the power to exercise pendent jurisdiction over *state law* claims against the defendant Spokane County, inasmuch as there was no independent basis of federal jurisdiction over this defendant. An order to that effect was entered on September 25, 1973 (App. 20).

The petitioner herein, citing *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d, 218 (1966), raised solely the pendent jurisdiction question on appeal to the court of appeals for the ninth circuit. The district court's ruling was affirmed by an opinion entered April 7, 1975 (App. 24).

SUMMARY OF ARGUMENT

The concept of joinder and the power of the court to provide complete relief and completely adjudicate claims is deeply rooted in traditional court systems. As early as 1824, Chief Justice Marshall, in the case of *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat) 738, (1824) established that there was no constitutional bar toward extension of the Court's jurisdiction over a "whole case" even though it meant adjudicating related state claims. This case is considered to be the origin of pendent jurisdiction.

This rudimentary extension of federal court jurisdiction was given new vitality in the case of *Hurn v. Oursler,* 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933) although the Court therein imposed a very strict and severe test to determine the propriety of applying the doctrine. Various courts thereafter had a difficult time applying this test until the Congress eased their burden by enacting Section 1338(b) of the Judiciary Code which substituted a much simpler test to apply.

The next significant development of the doctrine of pendent jurisdiction occurred in the case of *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) wherein the Supreme Court urged the application of pendent jurisdiction in appropriate cases and encouraged the joinder of

"claims, parties, and remedies". *Gibbs*, however, did not specifically empower the joinder of parties over whom there was no independent basis of federal jurisdiction.

Since *Gibbs,* the courts of appeals of eight circuits have had occasion to rule on the "pendent party" question. Six of the eight courts of appeals have found little trouble allowing the common sense principles of *Gibbs* to resolve the pendent party question. The court of appeals for the ninth circuit, however, has steadfastly refused to budge from its pre-*Gibbs* position that pendent jurisdiction applied only to claims and not to parties. This controversy continued to produce expressed criticism by the circuits of one anothers' positions, culminating in the realization by the Supreme Court in *Moor v. County of Alameda,* 41 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) that the ninth circuit stood virtually alone against the post-*Gibbs* trend in the courts of appeals.

Moreover, the various courts of appeals, in allowing the joinder of pendent plaintiffs and defendants in diversity cases, federal question cases, cases under Section 301 of the Labor Management Relation Act, admiralty cases, patent and copyright infringement cases, and civil rights cases, have given substantial justification and good reason therefor. Typical of these reasons is the following quotation from an eighth circuit court of appeals opinion, Mr. Justice Blackmun writing for the Court. "...in any event we find ourselves in sympathy with the third circuit approach for appropriate cases. It makes good sense; it avoids forum shopping; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time..." *Hatridge v. Aetna Casualty and Surety Co.*, 415 F.2d 809, 817 (8th Cir. 1969).

In the present case, which arises in the ninth circuit, considerations of judicial economy and fairness to the parties clearly dictate a reversal of the ninth circuit position, for, if the plaintiff is not allowed to present her claims against defendant Spokane County in the U.S. district court, she will be forced to file and to try another lawsuit in the Spokane County superior court that will be identical in every way to the pending suit in the U.S. district court, with one difference, the name of the defendant on the pleadings will be changed.

ARGUMENT

I.

INTRODUCTION

The jurisdiction of the Federal Courts was created and limited by the U.S. Constitution.[1] The courts cannot exceed the jurisdictional grant contained in the Constitution and implemented by statutes enacted by Congress, and Congress, also, is limited by the constitutional grant of authority and cannot, by statute, confer greater jurisdiction on the federal courts than is contained therein.

The judicially created doctrine of pendent jurisdiction, and ancillary jurisdiction to which it bears substantial analogue,[2] are traditional devices used to expand the jurisdiction of the Courts when necessary to preserve the court's effectiveness as well as to conduce

[1]U.S. CONST. art. III, §2

[2]See Claster. *"Pendent and Ancillary Jurisdiction: Towards a synthesis of 2 doctrines."* 22 UCLA L.Rev. 1263.

fairness to parties,[3] and have found a secure place in modern jurisdictional rules.

In *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d, 218 (1966), the U.S. Supreme Court, responding to confusion caused by earlier decisions, explained and simplified the application of the doctrine of pendent jurisdiction. The Court did not, however, make a definitive statement as to whether or not pendent jurisdiction could be asserted over a party over whom there was no independent basis of federal jurisdiction.

In *Moor v. County of Alameda*, 41 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), this Court underlined, but did not resolve, this perhaps inadvertent omission in the comprehensive *Gibbs* opinion. The significant omission has since been remedied by interpretations of eight of the circuit courts of appeals, all but two of which have ruled that the concept of pendent jurisdiction contemplates and allows the joinder of parties when appropriate.

While the *Moor* opinion suggests that this is a "subtle and complex question with far ranging implications" (411 U.S. at 715, 93 S.Ct. at 1798), the history and development of the judicially created doctrine of pendent jurisdiction, and its close relative ancillary jurisdiction, make the resolution of this question quite apparent, as a brief historical analysis indicates.

[3]The original purpose of Ancillary Jurisdiction appears to have been to preserve property before the court to allow all who had a claim to that property a forum in which to present that claim.

II.

THE HISTORY AND DEVELOPMENT OF THE DOCTRINE OF PENDENT JURISDICTION CLEARLY INDICATES THAT THERE IS NO CONSTITUTIONAL NOR STATUTORY BAR TO THE EXTENSION OF THE DOCTRINE TO INCLUDE THE JOINDER OF PARTIES. . . .

Modern jurisdictional rules evolved from practices developed in the royal courts of medieval England, the courts of Common Pleas, Exchequer, and King's Bench. As these courts evolved, they became very specialized and each exercised jurisdiction exclusively over certain types of actions. The means by which the jurisdiction of the court was evoked was by the use of the royal writs. Application was made to Chancery which would issue a writ directing one of the courts to entertain the particular cause of action specified in the writ.

In time, many of the writs became regularized in form and were automatically issued when a particular type of dispute arose. They became accepted as defining the limits of the particular cause of action. When, however, a situation arose which did not fall within one of the standardized writs, the Chancellor, at his discretion, could either refuse to issue a novel writ or could do so to meet the new situation.

Because a common law suitor, under this system, was required to define his cause of action in terms of an existing writ or the court would be without jurisdiction to grant relief, the Court of Chancery developed into a court of equity which would entertain actions without regard to form.

Except for a few specific situations, joinder of parties was not permitted under the common law and joinder

of claims was limited to such claims as, considered separately, could be maintained under the form of the writ chosen. Equity, however, developed a series of devices by which the scope of litigation could be appropriately enlarged in certain situations. These were the rules regarding necessary parties, intervention, class suits, and impleader.[4]

Equity permitted much freer joinder of parties and of claims. As long as the parties were before it, equity could grant whatever relief the situation warranted. This enabled a court of equity to dispose of a complex, involved controversy in one proceeding whereas multiple suits would be necessary at law.

> Where equity has acquired jurisdiction of a case, it may decide all matters incidentally connected with it so as to make a final determination of the whole subject. Story, EQUITY JURISPRUDENCE (14th ed. 1918), Ch. 1 §33 p.30.

The joinder rules of equity developed into the doctrine of ancillary jurisdiction. This doctrine was first enunciated by the U.S. Supreme Court in *Freeman v. Howe,* 65 U.S. (24 How.) 450 (1860). The *Freeman* Court held that, to prevent injustice, it could exercise jurisdiction over an ancillary suit which was supplementary to or dependent upon the original suit out of which it arose.[5]

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[4]See RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, 230 U.S., Appendix III.

[5]The case involved a suit in a federal court by the creditors of a railroad against the railroad. The creditors obtained a judgment, and a writ of attachment was issued and executed by a federal marshall. The marshall levied on certain railroad cars belonging to the railroad. A suit by the mortgagees of the cars was begun in state court to enjoin the federal marshall from proceeding further. The court held that the state suit could not be maintained because it had exclusive jurisdiction over the res, but it would consider the claim of the mortgagees as an ancillary claim to the original debt action.

Freeman was an example of a situation in which the court exercised ancillary jurisdiction to preserve the security of property over which it had jurisdiction. Fairness dictated that all parties claiming an interest in the property be provided a forum in which to test their claims. To rule otherwise, the claimant would be unable to assert his claim to the res while it remained under the control of the federal court and would be relegated to a pursuit of the property after its disposal according to court order.

Another purpose served by ancillary jurisdiction was to insure that all claims to a particular res were completely litigated by the court's decision. The court had an interest in providing complete relief when its jurisdiction was invoked. See, *Root v. Wentworth*, 150 U.S. 401 (1893); *White v. Ewing*, 159 U.S. 36 (1895); *Alexander v. Hillman*, 296 U.S. 222 (1935).

In 1926, the Court went further. In *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), the Court held that once a federal court took cognizance of an ancillary claim, it had jurisdiction over that claim even though the jurisdiction-granting federal claim had been dismissed on its merits. The Court felt that the defendant was not in court by his own choice and, in fairness to him, should be provided with a forum in which to present his related counterclaim.

With the adoption of the Federal Rules of Civil Procedure in 1938, these doctrines were significantly expanded. Ancillary jurisdiction was applied to compulsory counterclaims under Rule 13(a), cross-claims under Rule 13(g), and third party claims under Rule 14.

Paralleling the development of the doctrine of ancillary jurisdiction was the doctrine of pendent

jurisdiction. This doctrine is said to have originated in the decision rendered by Chief Justice Marshall in *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). This case established that the federal courts had the power to entertain questions outside the jurisdiction conferring claim before the court, Justice Marshall insisting that the jurisdiction of the court extended to "a whole case"[6] rather than to "parts of cases" or "to a single question" or "insulated point" in the case. *Id.* at 822.

The *Osborne* Court was presented with a question involving the federal statute which created the United States Bank. However, in order to decide the controversy, the Court also had to consider matters of state law. The Court held that the jurisdiction of the federal courts extended not only to federal issues themselves, but also to nonfederal issues essential to the settlement of the federal claim. Justification for this holding was found within article III of the Constitution wherein the jurisdiction granted to the court extends to "cases and controversies." By exercising its power in this way, the federal court is merely deciding a case which incidentally contains both federal and nonfederal questions. To not do so would arbitrarily prohibit the federal courts from adjudicating cases simply because a non-federal question was incidentally involved.

The first noteworthy application of this doctrine occurred in *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909). The court there upheld the power of a district court having jurisdiction to decide the

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[6]What is "a whole case"? See Shulman and Jaegerman, *Some Jurisdictional Limitations of Federal Procedure*, 45 Yale L. J. 393, 406 N.47 (1936).

constitutionality of a Kentucky statute setting up a railroad commission, to bypass the constitutional question and to decide the case on the basis of the pendent state claim regarding the validity of state railroad rate schedules. The court ruled on the state claim even though it declined to rule on the federal question. The court cautioned: "Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction." 213 U.S. at 191.

In both *Osborne* and *Siler*, the power found by the court was used to give complete relief in the case before it. Used in this way, pendent jurisdiction did not differ significantly from ancillary jurisdiction. In both instances, the Court feld that, to grant complete relief, it was justified in deciding the state claims.

The next significant treatment of the doctrine occurred in *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933),[7] wherein the court considered matters of procedural convenience in measuring the scope of the federal action.

The *Hurn* Court blurred the distinction between ancillary and pendent jurisdiction, relying on Equity Rule 30, Federal Equity Rules of 1912, 226 U.S. app., and cited *Moore v. New York Cotton Exchange, supra,*

[7]Hurn involved a federal claim based upon infringement of copyright and a state claim based upon unfair competition. The lower court dismissed the state claim for lack of jurisdiction, but decided the federal claim. The Supreme Court held that where two grounds, one federal, the other non-federal, are urged in support of *the same cause of action*, a federal court has jurisdiction to adjudicate both grounds, providing, of course, that the federal ground is substantial. The underlying policy reasons were judicial economy and convenience.

and *Ludwig v. Payson Manufacturing Co.*, 206 F. 60 (1913), a similar patent infringement case.

Hurn was typical of the majority of cases dealing with pendent jurisdiction. Most, like *Hurn*, involved actions based on the patent, copyright, and trademark laws, in which a nonfederal claim of unfair competition was joined with the federal claim of infringement. The various circuits had developed conflicting views of the allowable scope of jurisdiction, and the *Hurn* Court apparently intended to resolve these conflicting lines of decisions.

The test in *Hurn* for the type of claim cognizable under pendent jurisdiction was based upon a "single cause of action" concept. This immediately proved unwieldy and confusing due to the difficulty in arriving at a definition of the concept. The difficulty was expressed by Justice Sutherland who wrote the *Hurn* opinion. At one point in the opinion, he noted that a single cause of action existed when all legal rights were based on identical facts: 289 U.S. at 246, 53 S.Ct. at 590. He later stated that facts merely reveal when some right has been infringed, and that a single cause of action is established when there is a violation of but one right by a single legal wrong. 289 U.S. at 246, 53 S.Ct. at 590.

The "test" included a significant distinction; while a federal court is not empowered "... to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action ..." nevertheless, a

> "... distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two

> separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground; in the latter, it may not do so upon the nonfederal cause of action."
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> 53 S.Ct. at 589.

The post-*Hurn* cases tended to take a rather strict[8] view of this rule. In *Musher Foundation v. Alba Trading Co.*, 127 F.2d 9 (2d Cir. 1942), the majority held that in order for it to entertain a nonfederal claim, there must be complete identity of facts between the nonfederal and federal claims. The dissent felt that the doctrine set forth was illusory, ". . . unless we grant a reasonable and practical content to the yardstick and require for our unitary cause only a substantial amount of overlapping testimony . . . A converse view, requiring identity of facts, practically excludes the possibility of a single cause, since state and federal rights are hardly ever—if ever—complete equivalents, and differing rights depend on differing facts." 127 F.2d at 11.

The strict, virtually unworkable interpretation of the term "single cause of action" resulted from the indefiniteness of the *Hurn* test. Few courts were certain

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[8]For a rather critical pre-*Gibbs* view of the development of pendent jurisdiction see: *Pendent Jurisdiction: An Expanding Concept in Federal Court Jurisdiction*, 51 Iowa L. Rev. 151 (1965). A more moderate pre-*Gibbs* view is expressed in *"The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 Columbia L. Rev. 1018 (1962).

of its precise boundaries and found that the test was often easier to state than to apply. *American Security Co. v. Shatterproof Glass Corp.*, 166 F. Supp. 813 (D.C. Del. 1958).

In the midst of this confusion, Congress, in 1948, enacted the Judiciary Code, which gave the federal courts exclusive jurisdiction over patent, copyright, and trademark actions. 28 U.S.C. §1338(b) provides that:

> The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, or trademark laws.

The revisor's notes, 80th Congress House Report No. 308, (1947), stated that this section was "intended to avoid 'piecemeal' litigation to enforce common-law and statutory copyright, patent, and trademark rights by specifically permitting such enforcement in a single civil action in the district court." The notes cited and specifically referred to the majority and dissenting opinions in both *Hurn* and *Musher*.

The reference to *Hurn* has suggested to various commentators that in enacting §1338(b), Congress intended to codify the doctrine of pendent jurisdiction as stated in *Hurn*. Reference also to *Musher* indicates that this is not likely. *Musher* typified the problems posed by *Hurn* and the conflicting interpretations that the "single cause of action" test was subject to. The fact that Congress cited both cases indicates that it was well aware of the difficulty experienced by the courts.

In order to clarify the doctrine for the courts, Congress discarded the "single cause of action" test and substituted for it instead the phrase, "a substantial and related claim." This indicates a clear intent on the part

of Congress to reject the *Musher* majority's interpretation of *Hurn* and to eliminate the confusion created by an undefinable test.

Rejection of the "single cause of action" test allowed the courts considerable flexibility to extend the doctrine of pendent jurisdiction. This much more liberal interpretation was adopted later by the Supreme Court in *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

It is also clear that Congress did not intend to limit the scope of the doctrine of pendent jurisdiction to patent, copyright, and trademark cases. However, because most cases in which a pendent question arose were in the area of patent/copyright/trademark law, Congress was attempting to resolve a problem that was creating a great deal of confusion.

It cannot, however, be construed that Congress intended to strictly limit the application of pendent jurisdiction to this area. As indicated above, Congress not only intended to resolve a particular problem, but, by its choice of words, intended to liberalize the doctrine itself. Had it been the desire of Congress to limit the scope of the doctrine, it could have indicated with specificity, the kinds of cases to be considered. It did not do so.[9]

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[9]This view of Congressional intent has been uniformly adhered to by every court that has been called upon to consider the question. In *Strachman v. Palmer,* 177 F.2d 427 (1st Cir. 1949), the concurring opinion of Judge Magruder stated:

> [T]he enactment of this §1338(b) hardly warrants the inference that Congress intended that the pendent jurisdiction of the federal courts, as enumerated in *Hurn v. Oursler,* is to be confined to the special classes of cases enumerated in this subsection.

See also, *Jenn-Air Products Co. v. Penn Ventilator, Inc.,* 283 F. Supp. 591 (D.C. Penn. 1968); *American Foresight of Phila.,*

Further, since the enactment of §1338(b) in 1948, the courts have applied the doctrine of pendent jurisdiction to a wide variety of cases not limited to the patent, copyright, or trademark field. If inferences can be drawn from Congressional action, similar inferences can be drawn from its inaction. Congress has obviously been aware of the growth and development of pendent jurisdiction since 1948. Yet, not one legislative enactment has occurred to curb the liberal use of the doctrine nor has Congress attempted to limit its use to the patent and copyright field. This can only be construed as tacit approval of its development and reinforces the theory that Congress intended a liberalization of the doctrine.

The major distinction that remained between ancillary and pendent jurisdiction was that ancillary jurisdiction was primarily to be exercised by defendants while pendent jurisdiction was used for the convenience of the court and the plaintiff. Ancillary jurisdiction emerged for the protection of the defendant who was not voluntarily in the forum; fairness dictated that he be allowed to assert related claims and bring in related parties. Pendent jurisdiction, on the other hand, originated not because of fairness, but in the interest of judicial economy.

The case of *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), cleared up much of the confusion created by the distinction between ancillary and pendent jurisdiction. First, the Court broadened the scope of claims available for joinder, and second, it clarified the fact that the only

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Inc. v. Fine Arts Sterling Silver, 268 F. Supp. 656 (D.C. Penn 1967); *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.,* 12 F.R.D. 403 (D.C. N.Y. 1952); *Kaz Manufacturing Co. v. Chesebrough-Ponds, Inc.,* 211 F. Supp. 815 (D.C. N.Y. 1962).

real distinction between ancillary and pendent jurisdiction was the amount of discretion involved.

The *Gibbs* Court noted that the *Hurn* "single cause of action" test was formulated before the unification of law and equity that came with the adoption of the federal rules of civil procedure, and that under these rules, the impulse was toward entertaining the broadest possible scope of action consistent with fairness to the parties. Joinder of claims, parties, and remedies was strongly encouraged. 383 U.S. at 722, 86 S.Ct. at 1137. The *Gibbs* Court then defined a new standard for determining when a pendent claim should be considered:

> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

This new standard insured a far more liberal application of pendent jurisdiction. The Court recognized that, in terms of types of claims that could be considered, there was actually no difference between ancillary and pendent jurisdiction. This was not a new concept but it was one that had been lost when *Hurn* narrowly, and unnecessarily grudgingly, defined the claims cognizable under pendent jurisdiction. The Court in *Gibbs* however, retained the primary distinction between ancillary and pendent jurisdiction by stating at several points "that pendent jurisdiction is a doctrine of discretion, not of plaintiffs right," 383 U.S. at 726, 86 S.Ct. at 1139, and urged that the district courts exercise caution not to abuse that discretion.

III.

SINCE THE VERY STRONG ENCOURAGEMENT ENUNCIATED IN *UNITED MINE WORKERS V. GIBBS*, THE OVERWHELMING MAJORITY OF FEDERAL COURTS HAVE ALLOWED THE JOINDER OF PENDENT PARTIES AS WELL AS CLAIMS. . . .

Gibbs did not specifically deal with a "pendent party" situation. Its holding, however, has provided the starting point for the expansion of the doctrine of pendent jurisdiction to pendent parties. The important language of *Gibbs* on the issue of judicial power, which has been specifically cited by many circuit and district court decisions allowing joinder of pendent parties, is as follows:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." U.S. Const., Art. III, Sec. 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case". The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But, if considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal courts to hear the whole. 383 U.S. at 725, 86 S.Ct. at 1138 (citations omitted).

Although, the issue now under consideration is properly narrowed to the "pendent party" question, despite the

lack of a specific Supreme Court ruling, the common sense of *Gibbs* and its progeny clearly indicate that joinder of parties, as well as claims, is empowered when, in the discretion of the district court, it is warranted by the facts.

A. Many Courts of Appeals Have Recognized The Existence Of Power To Join Pendent Parties. . . .

The circuit courts of appeals for the second, third, fourth, fifth, sixth and eighth circuits have all held that the broad language of *Gibbs* permits the assertion of federal jurisdiction over additional parties who were not involved in the federal claim and whose sole connection with the case stemmed from the pendent state law claim. The doctrine has been invoked by these courts in a variety of different situations including joinder of pendent parties, both defendants and plaintiffs in diversity cases, federal question cases, admiralty cases, cases under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, patent infringement cases, copyright infringement cases, cases under the Interstate Commerce Act, 49 U.S.C. §20, and civil rights cases. Thus, pendent jurisdiction is not unique to any one particular type of case. Pertinent language from these decisions is as follows.

The Second Circuit

In *Almenares v. Wyman,* 453 F.2d 1075 (2d Cir. 1971), *cert. denied* 405 U.S. 944 (1971), the plaintiffs stated a federal claim under 28 U.S.C. §1343(3) and 42

U.S.C. §1983 against the city welfare commissioner for termination of their AFDC grants without a due process hearing. The plaintiffs' second claim was against the state, alleging that the state's review procedures regarding reduction or termination of AFDC grants were in conflict with HEW prescribed procedures. The court relied upon prior decisions and also upon *Gibbs* to find the state law claim to be properly pendent to the Constitutional claim against the city commissioner.

> For as we have recently held, the doctrine of pendent jurisdiction is sufficiently broad to support a claim within the limits of *Gibbs* against a person not a party to the primary, jurisdiction-granting claim. See *Astor-Honor, Inc., v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971); *Leather's Best, Inc. v. S.S. Mormaclynx,* 451 F.2d 800 (2d Cir. 1971), at 809.
>
> 453 F.2d at 1083.

Continuing the application of the pendent theory to the case before it, the court of appeals ruled that the district court also had power to join all the plaintiffs in the action on the pendent statutory claim against the state since the claims of the plaintiffs and all the members of their class derived from a common nucleus of operative facts.

> This is sufficient to vest the court with subject matter jurisdiction not merely over their primary claim, but also over their own pendent claims–all those arising from the "common nucleus of operative facts"–whether against the defendant to the primary claim or another. We see no valid distinction in the *power* of the court to join additional plaintiffs. (Emphasis the courts.)
>
> 453, F.2d at 1084.

Continuing to discuss the power of a federal district court to hear pendent claims, the court, in a footnote, stated the following.

> Clearly, as a *constitutional* matter, the court has the power to permit this. While the pendent claim here is federal and thus within one of the constitutional heads of jurisdiction, the same result would follow even if the pendent claim presented a question of state law and diversity of citizenship was absent. Chief Justice Marshall in *Osborne v. Bank of the United States,* 22 U.S. (9 Wheat) 738, 821-22, 6 L.Ed. 204 (1824), interpreted the *constitutional* scope of a "case" as including all questions, state or federal. . . . The presence of additional parties over whom federal jurisdiction would not otherwise exist does not change this. (citations omitted.)
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> 453 F.2d at 1084, fn. 12.

Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971) involved an action for copyright infringement, unfair competition, unfair trade practices. The district court had dismissed the claim against one of several defendants because it held it was a state tort claim for unfair competition even though, as the second circuit court of appeals noted, it also stated a claim within 28 U.S.C. §1338(b) for unfair competition. In so dismissing, the district judge relied on "... the general proposition that a state claim against one defendant cannot append to a federal claim against another . . ." 441 F.2d at 629. In disagreeing with the trial court on this question, the court of appeals held that it could have exercised jurisdiction over the state claim.

> There are indeed many statements supporting 'the general proposition' enunciated by the district

> court, notably, for our purposes, that in *Wasserman v. Perugini,* 173 F.2d 305, 306 (2 Cir. 1949), where this court declared that in the absence of diversity, a federal court did not have jurisdiction over individual defendants on a state tort claim arising from the same incident which was the basis of a separate count against the United States under the Federal Tort Claims Act. However, "cases antedating (citation omitted) that denied judicial power, i.e., jurisdiction over the pendent claim, are suspect as authority." 3A Moore, FEDERAL PRACTICE, 18.07 (1-4) (1974). The *Gibbs* Court described the proper test of pendent jurisdiction as follows, 383 U.S. at 725, 86 S. Ct. at 1138:
>
> > The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.
>
> . . . . A plaintiff with claims against three alleged conspirators for the same set of acts "would ordinarily be expected to try them all in one judicial proceeding," assuming that all defendants were subject to the process of the court. It would be an unjustifiable waste of judicial and professional time–indeed, a travesty on sound judicial administration–to allow Astor to try its unfair competition claim against Buckley and Bantam in federal court but to require it to prosecute a claim involving precisely the same facts against Grosset "in a State court a block away." The absence of any constitutional barrier to entertaining a sufficiently related state claim against a person who was not a party to the federal claim was recognized, prior to *Gibbs,* in cases involving

compulsory counterclaims under F.R. Civ. P. 13(a), (citations omitted), and third-party claims under F.R. Civ. P. 14, (citations omitted). The only post-*Gibbs* court of appeals decision that has been called to our attention which involved the joinder as defendants of persons not parties to the claim supporting federal jurisdiction is *Williams v. United States*, 405 F.2d 951, 955 (9 Cir. 1969). This presented the same problem as this court had faced, long before *Gibbs*, in *Wasserman v. Perugini, supra*, namely, the joinder of defendants as to whom there was no diversity with a claim for the same injury against the United States under the Federal Tort Claims Act. Although the *Williams* court approved the district court's dismissal of these defendants, we are not at all sure we would agree with this insofar as the decision rested on a general theory of lack of power.

441 F.2d at 629-30.

The court acknowledged that *Gibbs* did not deal with pendent parties but with claims. However, it felt the principles there enunciated applied equally to joinder of parties.

> Although the pendent claim in *Gibbs* did not include a party not named in the federal claim, Mr. Justice Brennan's language and the common sense considerations underlying it seem broad enough to cover that problem also.
>
> *Id.* at 629.

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) was an action in admiralty for contract damages because of a lost container and also tort damages against the bailee of the container under state law. The court of appeals again referred to its prior decisions interpreting *Gibbs* and allowed the

district court to exercise jurisdiction over the state claim as well as the admiralty claim. The court dealt with the apparently novel ingredient of a claim in admiralty, stating that

> . . . the constitutional rationale which underlies the doctrine of ancillary jurisdiction and Rule 14 may be applied to support the conclusion that a federal court has the power to hear a related state claim against a defendant not named in the federal claim regardless of whether the federal claim arises in the civil or admiralty jurisdiction. Thus, we conclude that in a case such as this, where the facts underlying the state and federal claims are identical, a federal court vested with admiralty jurisdiction over a shipper's claim against the carrier for breach of contract of carriage, does have the "power" also to entertain its state tort claim against a pier operator.
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> 451 F.2d at 810-11.

The Third Circuit.

The court of appeals for the third circuit has decided the issue of joinder of pendent parties similarly to the court of appeals for the second circuit.

In *Wilson v. American Chain & Cable Co.*, 364 F.2d 558 (3d Cir. 1966), a father's consequential damages claim against the manufacturer of a riding mower, from which his child fell and sustained cuts, was considered ancillary to the child's claim for injuries and both were allowed to be litigated in one suit. The court's reasoning was based on application of the doctrine of pendent jurisdiction. Speaking of the trial court's dismissal of the father's claim, the court said:

There is, moreover, a more fundamental error in the dismissal of the father's claim for lack of jurisdiction, although it was not raised below or here. The father's claim is not independent from the claim which he made on behalf of his minor son, for the father's damages flowed to him from the injury which the son suffered and are ancillary to the son's claim.

364 F.2d at 564.

In these circumstances it seems to us both appropriate and right to apply the doctrine of pendent jurisdiction, by which a claim cognizable in the federal courts may be permitted to carry with it a claim otherwise not within the federal jurisdiction, if both claims ordinarily would be tried in one judicial proceeding. (citation to *Gibbs* omitted.)

The usual case of pendent jurisdiction involves one plaintiff. Although the present case involves two plaintiffs, one the minor and the other the father in his own right, both these claims arise from the same occurrence . . . We have already recognized the principle where diversity of citizenship existed in a survival action by permitting an accompanying wrongful death action in which diversity of citizenship was lacking, to be maintained as pendent to it. (Citations omitted.) It is equally applicable to cases such as this where the diversity requirement or the amount in controversy is present in one but absent in the other of the two related claims of parent and child.

Id.

While *Wilson* espoused adding a pendent plaintiff, a later third circuit court decision applied the doctrine of pendent jurisdiction to allow federal jurisdiction in a diversity action over a pendent defendant even though the claim against this defendant was less than $10,000.

Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3d Cir. 1968), was a malpractice action against a hospital and two doctors under the New Jersey Death Act. The court of appeals held that there was a sufficiently close relationship between the hospital and at least one of the doctors and that convenience would be better served by trying in a single suit the claims for the death of a party who fell out of a hospital bed. Discussing its own application of pendent jurisdiction to hear such claims and referring to *Gibbs* as supportive of this extension of the original pendent concept, the Court said:

In recent years, this court has taken the lead in recognizing diversity jurisdiction over an entire lawsuit in tort cases presenting closely related claims based, in principal part at least, on the same operative facts and normally litigated together, even though one of the claims, if litigated alone, would not satisfy a requirement of diversity jurisdiction.

392 F.2d at 153.

Finally, this view of the scope of diversity jurisdiction where related claims are joined in a single lawsuit, finds significant analogical support in *United Mine Workers v. Gibbs,* 1966, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218, although federal question jurisdiction was involved there. That case liberalized the concept of so-called pendent jurisdiction "where two distinct grounds in support of a single cause of action are alleged, only one of which presents a federal question."

392 F.2d at 155.

Continuing to refer to *Gibbs,* the Court said:

The Court then urged hospitality toward requested adjudication of both federal and state claims that

"derive from a common nucleus of operative fact," particularly where "considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . ."

392 F.2d at 155.

Concluding, the Court said:

> These considerations seem as applicable to cases in which federal jurisdiction is based on diversity of citizenship as to federal question cases. We have given them effect in past diversity cases and we do so here.
>
> 392 F.2d at 155.

The Fourth Circuit.

The court of appeals for the fourth circuit follows the second and third circuit's recognition of the power of federal courts to exercise pendent jurisdiction to join parties, as is exemplified in *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968). That decision involved a settlor's action against a beneficiary under a trust and the beneficiary's mother for the tortious refusal to endorse stock certificates. In allowing the claims to be joined through the exercise of pendent jurisdiction, the court followed both the third circuit's approach in *Jacobson* and that of the Supreme Court in *Gibbs*.

> Thus, in multi-claim diversity cases, the Third Circuit treads the path recently blazed by the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218, where guidelines were announced for the proper handling of state claims in *federal question* cases.
>
> 405 F.2d at 97.

Discussing the difference between diversity cases and federal question cases for the purpose of applying the doctrine of pendent jurisdiction, the Court said:

> An apt analogy between the two is, however, at once apparent. In each situation, the federal court has before it a claim which clearly satisfies the requirements of Section 1331 or Section 1332, and in each instance the plaintiff asserts an additional claim which, if litigated alone, would not satisfy a jurisdictional requirement. Otherwise stated, the question in both the federal question area and the diversity area is whether a federal court may exercise jurisdiction over a claim which, standing alone, would not meet the jurisdiction test.
>
> We find the force of the analogy most compelling and therefore adopt the approach enunciated by the Supreme Court in *Gibbs*. . . .
>
> 405 F.2d at 97.

The court recognized *Gibbs'* discussion of the "power" of federal courts to exercise pendent jurisdiction and included the following statement.

> We find significance in the Court's emphasis on whether the "entire action" may be viewed as "but one constitutional 'case'," and are persuaded, as the Third Circuit was persuaded, that the same question should be asked in multi-claim diversity cases. If the entire lawsuit before us may be viewed as a single constitutional "case", the District Court could have taken jurisdiction over the claim against the grandson as well as the claims against the mother.
>
> 405 F.2d at 98.

The Fifth Circuit.

The fifth circuit court of appeals too, has considered and approved the exercise of pendent jurisdiction to

join claims against two separate defendants which arose out of the same factual situation. In the case of *Connecticut General Life Ins. Co. v. Crofton,* 415 F.2d 41 (5 Cir. 1969), a union and individual union members brought an action against the employer and an insurance carrier under the Labor Management Relations Act, 29 U.S.C. §185, to determine the rights to insurance coverage arising out of a collective bargaining agreement. Although having jurisdiction over the employer, the court noted a possible statutory jurisdictional problem involved in its taking jurisdiction over the claim against the insurance carrier because of the limitations in the statute over suits for violation of contracts between employers and labor organizations.

> When a union and individual union members seek relief against an insurance carrier not their employer, is such an action any longer a suit for the violation of a contract between an employer and a labor organization as required by Section 301 of the Labor Management Relations Act?
>
> 405 F.2d at 48.

After discussing prior cases dealing with a similar problem, the court resolved the question by invoking its power to exercise pendent jurisdiction over the claims against the insurance company.

> It may be that the scope of Sec. 301 is sufficiently broad to include within its coverage the declaration of rights under insurance policies which arise out of the collective bargaining process. However, the present case does not call for such a determination since the *power* of the district court over Connecticut General is here supportable under the doctrine of pendent jurisdiction. Since it could not be said that the federal labor claim involved in this case was obviously without merit, or clearly foreclosed by prior Supreme Court decisions, or

> should have been dismissed on the pleadings alone without presentation of evidence, the fact that the claims under the insurance contract and the collective bargaining agreement originated in a "common nucleus of operative fact," gave the district court pendent jurisdiction over Connecticut General irrespective of the dimensions of Sec. 301. (Citations omitted.) Given the amount of judicial time and energy already expended in this case, we think the strong and practical policies undergirding the pendent jurisdiction doctrine require that in this instance the rights of union members in their group insurance policy be determined by a federal forum. (emphasis supplied)
>
> 405 F.2d at 48.

The Sixth Circuit.

The court of appeals for the sixth circuit considered the pendent party question in *Beautytuft, Inc. v. Factory Insurance Association,* 431 F.2d 1122 (6th Cir. 1970). That case was a diversity action under 28 U.S.C. §1332 by three carpet manufacturers on fire insurance policies for business losses resulting from fires. The issue before the court was whether it had jurisdiction over 24 of 58 insurance company defendants whose contract liability was less than the $10,000 jurisdictional amount required by Sec. 1332. Finding that the district court had properly taken jurisdiction over these defendants, the court said:

> . . . the claims arise out of the same transaction and the proofs required (except as to amount of liability) are identical in every respect. Clearly, in the interest of avoiding sheer waste of court time, these claims should be tried together. We believe

> the District Judge was entirely correct in asserting pendent jurisdiction as to the 24 defendants.
>
> 431 F.2d at 1128.

A similar situation was involved in *F. C. Stiles Contracting Co. v. Home Insurance Co.*, 431 F.2d 917 (6th Cir. 1970). In that case, a diversity action against multiple defendants on value reporting fire policies, one defendant moved to dismiss the action as to them since the claim against them was less than the $10,000 jurisdictional amount. The court affirmed the district court's denial of the motion by referring to *Gibbs'* power theory.

> However, in the present controversy the required jurisdictional amount is satisfied against Home Insurance. Thus, the rationale used in pendent jurisdiction cases, notably *United Mine Workers v. Gibbs,* (citation omitted) is applicable by analogy to the present situation. This would allow a plaintiff to adjudicate in a single federal forum a claim against a diverse defendant which does not meet the necessary jurisdictional amount if it is properly joined with a claim against another defendant which meets all the necessary jurisdictional requirements, provided that both claims are part of the same controversy.
>
> 431 F.2d at 919.

Patrum v. City of Greensburg, Kentucky, 419 F.2d 1300 (6th Cir. 1969), is a decision of the court of appeals which was previously been relied upon by the court of appeals for the ninth circuit as a rejection of the doctrine of pendent jurisdiction. The ninth circuit court of appeals has since realized their misplaced reliance (App. 29, fn.2) because this case indeed acknowledged that federal courts have "power" to join pendent parties as well as to hear pendent claims. The

Patrum court, noting the often quoted language of *Gibbs* about the "power" of federal courts to hear state claims which derive from a common nucleus of operative fact with the federal claim, allowed the district court to decide, as a matter of discretion, not to exercise this power in the action before it. What the court of appeals said was:

> We read the decision of the Supreme Court in *Gibbs* as indicating: (1) The decision to exercise the power of the doctrine of "pendent jurisdiction" lies within the discretion of the trial court . . .
>
> 419 F.2d at 1302.

Thus, the sixth circuit has recognized the "power" of federal courts to hear pendent claims and to join pendent parties, and reiterated that the doctrine of pendent jurisdiction is in fact, a discretionary doctrine to be exercised as appropriate by the trial court.

The Seventh Circuit.

The court of appeals for the seventh circuit has dealt with this issue only once since the holding in *Gibbs*. *Hampton et al. v. City of Chicago et al.*, 484 F.2d 602 (1973). The court held that the district court lacked power to join claims against a non-diverse defendant. The opinion did not, at any point, refer to or cite *Gibbs,* but relied for authority solely upon the pre-*Gibbs* case of *Wojtas v. Village of Niles,* 335 F.2d 797 (7th Cir. 1964), *cert. denied* 379 U.S. 964, 85 S.Ct. 655, 13 L.Ed. 558 (1965) and is, thus, less than a thorough analysis of the issue.

The Eighth Circuit.

The primary decision on the pendent party question in the eighth circuit is *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969). There the court of appeals reasoned that a wife's claim for loss of consortium was contingent on the success of her husband's claim for personal injuries suffered when a bus overturned and was so intertwined with it that her claims against the separate parties were allowed to be joined under the theory of pendent jurisdiction. Mr. Justice Blackmun wrote the decision for the court.

> Although *Gibbs* concerned claims possessed by a single plaintiff, the decision clearly indicates that "there is *power* in federal courts to hear the whole." 383 U.S. at 725, 86 S.Ct. at 1138.
>
> 415 F.2d at 816-817.

After referring to cases decided by the third circuit court of appeals and contrasting them with those decided by the ninth circuit court of appeals, the court opted in favor of the third circuit view.

> The Ninth Circuit decision hangs upon a case decided 29 years ago, long prior to *Gibbs* but subsequent to *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), where the doctrine of pendent jurisdiction, although not referred to by that name, was given some vitality.... In any event, we find ourselves in sympathy with the Third Circuit approach for appropriate cases. It makes good sense; it avoids forum shopping; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time. We feel that a consortium suit, in the light of its stated character under Arkansas law, is ideal for the application of the doctrine. We apply pendent jurisdiction as a supportive ground for our conclusion here.
>
> 415 F.2d at 817.

The final court of appeals decision to be discussed will be *Schulman v. Huck Finn, Inc.*, 472 F.2d 864 (8th Cir. 1973). Involved there was a claim for damages for patent infringement and unfair competition through misappropriation of trade secrets. Though the infringement claim was dismissed as to two of the defendants, the district court reasoned that the unfair competition claims involved the same facts and thus retained jurisdiction over these two defendants under its power to exercise pendent jurisdiction over the claims against them. In affirming the district court's rationale, the court of appeals briefly discussed and either rejected or distinguished *Hymer* and the other decisions raised in support of the "lack of power" position. The court stated:

> We agree with the rationale of the district court that as a matter of law under Sec. 1338(b), *or as a matter of discretion in the exercise of pendent jurisdiction*, the appealing defendants must remain in this federal lawsuit for, as Judge Larson indicated "... It would be an unjustifiable waste of judicial and professional time—indeed, a travesty on sound judicial administration—to allow plaintiff to try his unfair competition claim against Reynolds and Huck Finn, Inc., in Federal court but to require him to prosecute a claim involving precisely the same facts against Berquist and Solar Plastics, Inc., in a State court...."

Defendants have cited cases to the contrary on the pendent jurisdiction theory, *Hymer v. Chai*, 407 F.2d 136 (9th Cir. (1969); *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972); *Patrum v. City of Greensburg, Kentucky*, 419 F.2d 1300 (6th Cir.

1969), cert. denied 397 U.S. 990, 90 S.Ct. 1125, 25 L.Ed.2d 398 (1970); *Wojtas v. Village of Niles,* 334 F.2d 797 (7th Cir. 1964); cert. denied 379 U.S. 964, 85 S.Ct. 655, 13 L.Ed.2d 558 (1965).

We find these precedents inapposite. The general doctrine enunciated in *Hymer, supra,* 407 F.2d at 137, that the doctrine of pendent jurisdiction applies only to joinder of claims, and not to joinder of parties, has been criticized and rejected by this court in *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809, 817 (8th Cir. 1969). Without exercising judgment as to the merits of the jurisdictional determinations in the remaining cases, we find them distinguishable on their facts. (emphasis supplied.)

472 F.2d at 866-67.

B. U.S. District Court Decisions Have Also Recognized The Power To Join Pendent Parties. . . .

Several U.S. district court cases have occurred since *Gibbs* in which the court has relied on that decision's language about the power inherent in federal courts, to exercise pendent jurisdiction over nonfederal parties as well as claims.

Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966), involved a minor's claim for injuries sustained in an automobile accident and also his father's claim for medical expenses and loss of services due to the son's injuries. The son's claim was properly within the court's diversity jurisdiction and the issue was whether the father's claim could be joined under Fed. R. Civ. P. 15(a). Since this would destroy diversity jurisdiction in the case, the claim could be joined only under pendent

jurisdiction. Applying the *Gibbs* rationale the court said:

> Under the doctrine of pendent jurisdiction, this court has power over any claim for relief not otherwise subject to its jurisdiction so long as it derives from a common nucleus of operative fact with a federal claim that is properly within our power as outlined in Article III of the Constitution.
>
> 262 F. Supp. at 107.
>
> The whole basis of pendent jurisdiction is the fact that one claim is within our jurisdiction and the other would not be if it stood alone. The reason why it is not within our power seems to be immaterial, and no cases have been pointed out to us by counsel where such distinction has been drawn . . . The $10,000 requirement and the diversity requirement are both limitations on our power to hear cases, and we can see no distinctions between them for the purposes of the motion now before us. So long as one claim is substantial and is properly before us and the other derives from the same operative facts in the manner it does here and logically would be tried in the same proceeding, we have power to adjudicate the entire controversy.
>
> 262 F. Supp. at 108-09.

Applying this reasoning to the factual situation before it, the court allowed joinder of the father's claim. Though the situation in *Newman* concerned joining an additional plaintiff under pendent jurisdiction, the court's language is easily adaptable to application of the doctrine of pendent jurisdiction to join defendants as well.

A decision from an Iowa district court, which presented a thorough discussion of the exercise of

pendent jurisdiction to join parties both in terms of *Gibbs* and in terms of other federal cases considering application of the doctrine, was *Eidschun v. Pierce,* 335 F. Supp. 603 (D.D. Iowa 1971). That case involved a civil rights action under 42 U.S.C. §1983 and state tort claims for assault against the City of Council Bluffs and five of its police officers for the death of the plaintiff's testator. In determining how to rule on the city's motion to dismiss for lack of jurisdiction, the court reviewed *Gibbs, Jacobson, supra, Patrum, supra,* and some other decisions involving similar factual situations. After noting the language of the *Patrum* decision regarding the power of federal courts to exercise pendent jurisdiction to join parties, the court in *Eidschun* said:

> On the basis of the *Patrum* decision, this Court concludes that it does have the power under the *Gibbs* articulation of the doctrine of pendent jurisdiction to entertain the state claims against the City of Council Bluffs in the instant case.
>
> 335 F. Supp. at 609.

Noting the paucity of decisions expressly supporting this interpretation of pendent jurisdiction, the court observed that a trend favoring such an application of the theory had developed.

> Although a few cases in recent years have held against the exercise of pendent jurisdiction, the clear trend in the last decade, and especially since *Gibbs,* is towards hearing state claims in federal courts in the situation where the claims of some plaintiffs meet federal jurisdictional requirements and the claims of other plaintiffs, although not meeting federal jurisdictional requirements independently, arise out of the same nucleus of operative fact.
>
> 335 F. Supp. at 610.

After reviewing the other decisions in the area, the court resolved the question in favor of exercising jurisdiction over the city.

> ". . . . while there are many reported decisions which have allowed the entry of additional plaintiffs, there are very few which have allowed the addition of new defendants under the doctrine of pendent jurisdiction. This Court can see no meaningful distinction between the two situations . . .
>
> The four cases discussed above, involving the question of bringing in additional defendants under the doctrine of pendent jurisdiction all agree that a federal court has the power by reason of the *Gibbs* decision to hear such pendent claims. The cases split over whether the district court should exercise its discretion to hear the pendent claim, each case following the *Gibbs* standards, and each case being decided on its own unique facts. The court can find no case decided after *Gibbs* and meeting the *Gibbs* power criteria which says a federal court does not have the power and discretion to hear a pendent claim against an additional defendant. . . .
>
> This Court does have the power to hear the state claims against the City of Council Bluffs.
>
> 335 F. Supp. at 612.

Another case dealing with the joinder of additional defendants under the theory of pendent jurisdiction was *Shippers & Receivers Coop. Ass'n, Inc.,* 355 F. Supp. 949 (E.D. Pa. 1973). In that case, a shipper-consignee asserted a claim against a railroad under the Interstate Commerce Act, 49 U.S.C. §20, and a negligence claim against a codefendant as to whom there was no diversity of citizenship for damage to goods shipped. Reviewing *Hurn* and *Gibbs* and the standards set out in

the latter decision for the exercise of pendent jurisdiction, the court cited with approval the observation in Moore's FEDERAL PRACTICE that

> . . . cases antedating *Gibbs*, denying judicial power over the pendent claim, are "suspect as authority". 3A Moore, FEDERAL PRACTICE, Sec. 18.07, (1-4) at p.1953.
>
> 355 F. Supp. at 951-52.

After discussing decisions from the court of appeals for the third circuit, especially *Jacobson v. Atlantic City Hospital, supra,* and its statement that the considerations underlying the exercise of pendent jurisdiction in federal question cases are equally applicable to diversity cases, the court ruled that it had power to take jurisdiction over pendent parties.

> Thus, on the legal issue before us, we conclude that under *Gibbs,* federal jurisdiction may be asserted over additional parties who were not involved in the federal claim and whose sole connection with the case stemmed from the pendent state law claim.
>
> 355 F. Supp. at 954.

Other district court decisions which recognized the power to join additional parties under the theory of pendent jurisdiction but which did so without extensive discussion of the underlying rationale are: *Fahrner v. Gentzsch,* 355 F. Supp. 349 (E.D. Pa. 1972), allowing the exercise of federal jurisdiction over a nondiverse plaintiff; *Thomas v. Old Forge Coal Co.,* 329 F. Supp. 1000, 1002 (M.D. Pa. 1971), recognizing the court's power to join a pendent defendant; *Maloney v. United States,* 354 F. Supp. 480, 481 (S.D. N.Y. 1972), allowing joinder of a tort claim against a nondiverse

defendant; and, *Latch v. Tennessee Valley Authority,* 312 F. Supp. 1069 (N.D. Miss. 1970), which, while recognizing the court's power to hear the state claim against a defendant, decided, as a matter of discretion, not to exercise the power because of other factors in the case.

IV.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS STEADFASTLY DECLINED TO ALTER ITS PRE-*GIBBS* REFUSAL TO ALLOW THE JOINDER OF PENDENT PARTIES. THE NINTH CIRCUIT VIEW IS "SUSPECT AS AUTHORITY". . . .

> "*Hymer* stands virtually alone against (the) post-*Gibbs* trend in the courts of appeals, and significantly *Hymer* was largely based on the Court of Appeals' earlier decision . . . which predated *Gibbs* and the expansion of the concept of pendent jurisdiction . . ." (footnote omitted.)
>
> *Moor v. County of Alameda,* 411 U.S. at 713-714 referring to *Hymer v. Chai,* 407 F.2d 136 (1969).

As stated in Moore's FEDERAL PRACTICE, "Cases antedating *Gibbs* that denied judicial power, i.e., jurisdiction over the pendent claim, are suspect as authority." 3A.J. Moore, FEDERAL PRACTICE ¶18.07, [1-4], at p.1953 (2d ed. 1974).

If *Gibbs,* and the wide panorama of cases it produced, leave any doubt as to the reasonableness and common sense approach of allowing joinder of pendent parties in appropriate circumstances, it is not apparent to the U.S. district court for the central division of

California. That court, after waxing eloquent on the propriety of applying pendent jurisdiction to a nonfederal party in the case before it, concludes with the reluctant realization that, residing within the ninth circuit, it was bound by *Hymer v. Chai*, 407 F.2d 136 (1969)[10] , whereupon it provided the plaintiff with a 28 U.S.C. §1292 certification.

In the case of *Kaufman v. Union Pacific Railroad Co.*, 351 F. Supp. 392 (C.D. Ca. 1972), a railroad employee sought to join a second defendant in his action under the Federal Employers' Liability Act, 45 U.S.C. §51, et seq. for injuries sustained when he fell from a box car. The plaintiff, an employee of the Union Pacific Railroad, tried to stop a moving car which belonged to the Southern Pacific Railroad. The brake on the car failed to work properly and the plaintiff was injured. The plaintiff sued both railroads under FELA and also charged violation of the Railroad Safety Appliance Act, 45 U.S.C. §11 because the car was not equipped with an effective hand brake. Southern Pacific moved for dismissal alleging that there was no cause of action stated against it under FELA since it was not plaintiff's employer and that the other Act did not create a federal claim. Agreeing with these contentions, the court stated that any recovery against Southern Pacific would thus have to be based on state law. Since diversity would be destroyed if Southern Pacific was joined, the court concluded that Southern Pacific's motion for dismissal must be granted unless it could be joined under the theory of pendent jurisdiction.

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[10]*Hymer*, a post-*Gibbs* case, continues to rely upon *Takashi Kataoka v. May Department Stores Co.*, 115 F.2d 521 (9th Cir. 1940), a pre-*Gibbs* case.

In its discussion of the doctrine of pendent jurisdiction, the court expressed the frustration of being bound by the inflexible ninth circuit position.

> This court is of the view that, assuming that the plaintiff can sustain his allegations, the entire case involves "... but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex."....
>
> Also, it seems evident that considerations of reasonable convenience, financial economy, conservation of judicial time, and fairness to the parties strongly indicate that all of the claims growing out of the plaintiff's fall from the freight car should be litigated in one action.
>
> Under these circumstances, it would appear that this case fulfills the test of pendent jurisdiction announced in the opinion in *Gibbs*.... (Citation and quotation from *Gibbs* omitted.)

This court finds nothing in such a test that would necessarily exclude use of pendent jurisdiction to accomplish joinder of parties, particularly inasmuch as the *Gibbs* opinion said, with respect to the Federal Rules of Civil Procedure; "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, *parties* and remedies, is strongly encouraged." (383 U.S. at 724, 86 S.Ct. at 1138). (Emphasis supplied)

I believe, also, that there is much merit in *Hipp v. United States*, 313 F. Supp. 1152 (E.D. N.Y. 1970), which invoked pendent jurisdiction under comparable circumstances.

However, I am obliged to conclude that the controlling decision in this Circuit is *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969), which ruled

that the doctrine of pendent jurisdiction applies to "joinder of claims, not joinder of parties." (Page 137).

351 F. Supp. 393.

Though it felt bound by the ninth circuit decision, the district court respectfully suggested that the court of appeals reevaluate its position.

> In view of the possibility that the Court of Appeals might agree with this court that the *Hymer* doctrine is unduly restrictive when applied to the situation here concerned, the present order is certified as being appropriate for interlocutory appeal, pursuant to 28 U.S.C. Sec. 1292(b), in the event that the plaintiff desires to prosecute such an appeal.

351 F. Supp. at 394.

The case of *Hipp v. United States,* 313 F. Supp. 1152 (E.D. N.Y. 1970), cited in *Kaufman* above, concerned an action against the United States and a private defendant for injuries sustained when a Navy ambulance collided with the car driven by the private defendant. The issue was whether the federal court could exercise jurisdiction over the private defendant. The court answered this query by discussing the development of the doctrine of pendent jurisdiction since *Hurn*. The court noted that the law set out by *Hurn* was changed by *Gibbs* and continued to discuss the doctrine's development under *Gibbs* and its progeny.

> This case differs from *Gibbs* and *Rosado* in that they involved two causes of action against one person rather than one cause of action against two persons. Nevertheless, the court in *Gibbs* treated joinder of parties as similar to joinder of causes of

> action. It cited the adoption of the Federal Rules of Civil Procedure as one of the reasons for departing from the Hurn test and stated (383 U.S. at 724, 86 S.Ct. at 1138):
>
> > Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged.
>
> The case of a joint tort-feasor made a defendant in a case under the Federal Tort Claims Act is peculiarly appropriate for application of the principle of "the conservation of judicial energy and the avoidance of multiplicity of litigation" because the "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding."
>
> 313 F. Supp. at 1154-55.

Having so found pendent jurisdiction appropriate in the case before it, the court took jurisdiction over the private defendant.

At this time, district courts in the second, third, fourth, fifth, sixth, and eighth circuits are free to make determinations of this nature in appropriate cases, as their advised discretion dictates. The U.S. district court for the eastern district of Washington cannot.

V.

THERE IS SUBSTANTIAL JUSTIFICATION AND VERY GOOD REASON FOR THE DISTRICT COURT TO HAVE THE POWER TO DETERMINE, AS A MATTER OF DISCRETION, WHETHER IT IS USEFUL, HELPFUL, NECESSARY, OR OTHERWISE APPROPRIATE TO HEAR CLAIMS AGAINST NONFEDERAL PARTIES.

The most convincing expression of justification for the district court's power to join pendent parties can be found in the *Gibbs* opinion itself. Although *Gibbs* did not specifically refer to the question of joinder of parties, courts have held that ". . . Mr. Justice Brennan's language and the common sense considerations underlying it seem broad enough to cover that problem also." *Astor-Honor, supra* at 629-630.

There are many policy reasons for the district court to have the power to hear and decide claims involving pendent parties. The constant thread woven through every analysis of the question is the preservation of judicial economy, convenience, and fairness to litigants. The application of these strong policy considerations frequently takes many forms: the doctrine of res judicata, the doctrine of collateral estoppel, prevention of forum shopping, avoiding duplication of damage awards (fashioning relief), fulfilling the philosophy of the Federal Rules, avoiding piecemeal litigation, and effectuation of federal policy are all questions that must be answered when the court, in its pretrial order, determines the issues to be tried. There are, very obviously, a myriad of occasions when one or more of

these intensely practical considerations will indicate or require the joinder of a pendent party.

The grant of judicial power of Article III §2 is over "cases". The *Gibbs* Court recognized that a state claim can be sufficiently related to a federal claim so that "the entire action before the Court comprises but one constitutional 'case' ". 383 U.S. at 725, 86 S.Ct. at 1138. Indeed, throughout the history of our judicial system, "cases" have often involved three or more parties, and under the Federal Rules, "joinder of claims, parties and remedies is strongly encouraged".[11] *Gibbs,* 383 U.S. at 724, 86 S.Ct. at 1138.

Often, when the question of "pendent party" arises, the facts are such that there would be little question as to the propriety of joinder were the configuration of parties different. An example of this occurred in *Borror v. Sharon Steel Co.*, 327 F.2d 165 (3rd Cir. 1964). In that pre-*Gibbs* case, an out of state administrator brought, in federal court, an action for survival as well as an action for wrongful death. The court held that both actions were properly tried by the administrator, but that even if they were not, the court could exercise jurisdiction over the wrongful death claim of the nonfederal plaintiff, pendent to the courts diversity jurisdiction over the survival claim. See also, *Newman v. Freeman,* 262 F. Supp. 106 (E.D. Pa. 1966).

Gibbs outlined three "tests" to determine the propriety of joining a pendent state claim. First, the threshold question is whether the jurisdiction granting federal claim is substantial. The second test is stated as follows:

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[11]See e.g., Fed. R. Civ. P. 2, 18-20, 42.

"The state and federal claims must derive from a common nucleus of operative fact."

383 U.S. 725, 86 S.Ct. 1138.

It is clear that this test can be met in a pendent party situation. The court of appeals for the second circuit, in joining a pendent defendant, stated:

"Thus, we conclude that in a case such as this, *where the facts underlying the state and federal claims are identical,* a federal court vested with admiralty jurisdiction over a shipper's claim against the carrier for breach of contract of carriage does have the "power" also to entertain its state tort claim against a pier operator." (Emphasis supplied.)

Leather's Best Inc. v. S.S. Mormaclynx, 451 F.2d 800, 811 (2nd Cir. 1971).

The instant case has similarly identical facts giving rise to both federal and state claims.

The third test is:

"But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . ."

383 U.S. 725, 86 S.Ct. at 1138.

Clearly, the Federal Rules contemplate that a plaintiff could "ordinarily be expected" to join additional plaintiffs or defendants in the same "case". Fed. R. Civ. P. 18-20. While the rules cannot expand federal jurisdiction (See Fed. R. Civ. P. 82), certainly they can be regarded as visible testimony to the expectation that cases may include more than one plaintiff or defendant.

One commentator has suggested that the phrase "ordinarily be expected to try them all in one judicial proceeding" refers to the requirements of the doctrine

of res judicata, were all of the involved claims federally created or state created.[12] See Wright, Miller and Cooper, FEDERAL PRACTICE AND PROCEDURE §3567 P.445 (1975).

However, in *Gibbs,* this Court recognized that it was not the doctrine of res judicata that compelled federal courts to exercise pendent jurisdiction, but rather the underlying rationale of that doctrine.

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[12]The doctrine of res judicata only bars litigation of matters contained in the "same cause of action" as those which were or could have been finally adjudicated in a prior case. *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 579-80, 94 S.Ct. 806, 811-12 (1974). This doctrine has the effect of making judgments conclusive upon any later action, not only to those matters which actually were litigated, but also to matters which could have been litigated in the prior action. A claimant cannot "split" his cause of action. *Harrison v. Bloomfield Bldgs. Indus.*, 435 F.2d 1192 (6th Cir. 1970). If an issue is beyond the jurisdiction of a court, by definition it is not one which "could have been litigated", and hence a party cannot be barred by failing to raise it. If a claim is pendent or ancillary to an existing claim, then it "could have been litigated". However, if it is neither pendent or ancillary to an existing claim, the operation of res judicata will not require the assertion of either one of the doctrines to preserve the claim. Therefore, the possible application of res judicata is not a proper test to determine when pendent or ancillary jurisdiction should be exercised.

The requirement of the doctrine of res judicata, and of pendent jurisdiction under *Hurn,* that two claims "state the same cause of action", was rejected in *Gibbs* as being "unnecessarily grudging" as a test for whether a claim could be pendent. The "same cause of action" test is still used, however, as an element of res judicata. *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 579-80, 94 S.Ct. 806, 811-12 (1974). *See also, Shakman,* 20 Stan. L. Rev. 262, 279-280. *The New Pendent Jurisdiction of the Federal Courts.*

> "Had the court found a jurisdictional bar to reaching the state claim in *Hurn*, we assume that the doctrine of *res judicata* would not have been applicable in any subsequent state suit. But the citation of *Baltimore S.S. Co.* shows that court found that the weighty policies of judicial economy and fairness to parties reflected in *res judicata* doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as federal claims."
>
> 383 U.S. 724, 86 S.Ct. 1137-8.

The Court was clearly not as interested in the elements of res judicata as it was in the underlying policies and their relation to pendent jurisdiction.

On the other hand, collateral estoppel provides compelling justification for the addition of pendent parties. Estoppel occurs if the issue is identical to an issue in a prior case, if the first judgment was final, and if the person against whom it is asserted was a party to the prior action.[13] *Blonder-Tongue Lab. Inc. v. Univ.*

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[13]The older view of collateral estoppel requiring "mutuality" of estoppel has been rejected. In *Blonder-Tongue Lab. Inc. v. Univ. of Ill. Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), the Court recognized that plaintiff who "has had one full and fair opportunity to prove a claim and has failed in that effort should not be permitted to the trial on the merits of that claim a second time". 402 U.S. 323, 91 S.Ct. 1440. The Court recognized the public interest in efficient judicial administration and the interest in a proper allocation of resources, and served those interests in rejecting "mutuality". *Id.* at U.S. 329-30, S.Ct. 1142-3. Where a federal plaintiff seeks to observe these principles by joining a pendent defendant, his efforts should not be thwarted by an inflexible rule.

of Ill. Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). Under this doctrine, a plaintiff who loses an issue in a suit can be estopped from raising the same issue against a different party in a later suit. However, if the plaintiff should win in the first suit, he must re-litigate the issue against the different defendant in the second suit. The second defendant gets two chances to win but the plaintiff must win twice to get full recovery, a "gaming table" advantage.[14] This inordinate result of identity of claims but not of parties, is clearly contrary to the *Gibbs* rationale.[15]

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[14]The phrase "gaming table" is taken from the *Blonder-Tongue* opinion, in which "mutuality" of estoppel was rejected.

[15]Obviously, collateral estoppel may be successfully asserted by a defendant in a suit in state court on the basis of a federal judgment where the defendant was not a party to the federal proceeding. *Vavolizza v. Krieger*, 352 N.Y.S.2d 919 (1974). Such a result is especially distasteful where "... the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong ..." *Gibbs, supra*, at U.S. 727, S.Ct. 1139.

The validity of this proposition was underscored in the American Law Institute Study, *"The Division of Jurisdiction between State and Federal Courts"* 164-165 (1969). Some of the reasons advanced by the Study for preferring federal courts for federal question cases are: (i) "a considerable expertise in the interpretation and application of federal law which would be lost if federal question cases were given to the state court." (ii)a belief "that greater uniformity [of decisions] results from hearing those cases in a federal court"; and (iii)a belief "that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts." In addition to these considerations, the study observed:

> Finally, determinations of fact by the state court are subject to, at most, limited review in the Supreme Court. The federal rights of a party will frequently depend upon

Surely, a crafty defendant would enjoy such a result. As he watches the first trial insulated from liability, he learns the plaintiff's trial strategy without risk. If the plaintiff prevails against the first defendant, the second defendant has the immeasurable advantage of having observed a trial of precisely the same issues that he will face, and can prepare accordingly. Accordingly, the very real possibility of the assertion of the doctrine of collateral estoppel provides very strong impetus to a court to allow all parties to be joined in the original action.

Further, many actions involve claims which are complementary in nature. In these actions, pendent jurisdiction is particularly appropriate to avoid the possibility of double recovery. In speaking of wrongful death and survival actions, the court of appeals for the third circuit stated as follows:

> "The two suits are complementary under the laws of Pennsylvania. The plaintiff and the defendant are the same in both causes. The tort relied on is the same in both, the operative facts which give rise to the two suits are identical in each. The wrongful death action may be considered ancillary or pendent to the survival action, or the latter pendent to the former. Such a concept seems clearly within the contemplation of Pennsyl-

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what the facts are found to be—see *Prentis v. Atlantic O. L. Co.*, 211 U.S. 210, 228 (1908)—and an appeal, after the case has been shaped by the fact findings of an unsympathetic state court, is, as Chief Justice Marshall long ago observed, an 'insecure remedy'. *Osborne v. Bank of the United States*, 9 Wheat. 738, 822 (1824)

Id. at 167-168.

> vania practice. Such a course saves the time of jurors, of witnesses, of the parties and of the judges, and prevents tortfeasors from being mulcted of damages."
>
> *Borror v. Sharon Steel Co.*, 327 F.2d 165 (3rd Cir. 1964).

Members of this Court are well aware of the dangers of overcompensating a plaintiff in actions of this nature. A strong dissent was entered in a decision allowing a wife to sue in admiralty for wrongful death and financial loss upon the death of her husband after his estate had once recovered for lost earnings. Mr. Justice Powell, in dissent, had this to say:

> "There should be strong reasons of policy to justify such repetitive suits and to impose on the petitioner the attendant doubling of litigation expenses. The reasons advanced by the majority opinion do not, in my view, approach that level of persuasion. Petitioner has already fully litigated, and paid, a large judgment compensating Gaudet's estate for the injuries Gaudet incurred on board its vessel . . . Today's result deprives petitioner of that reliance interest [in considering the case closed], subjecting it to another round of litigation with wide-open damage possibilities".
>
> *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. at 612-13, 94 S.Ct. at 828.

The problem of a plaintiff being over-compensated may also arise where he has claims for the same injury against two defendants. In joining a hospital as a pendent defendant in a wrongful death action, the court of appeals for the third circuit said:

> "It should be added that in the present case no apparent disadvantage would be imposed upon the hospital, located in Atlantic City, by having the

> claim against it tried in a New Jersey federal court together with the claims against the doctors. Indeed, such a procedure may well aid in the equitable determination and allocation of responsibility, if any, for the fatal mishap."
>
> *Jacobson v. Atlantic City Hospital,* 392 F.2d 149, 154 (3rd Cir. 1968).

Under the facts of that case, the proper allocation of damages could have been a momentous factor. The hospital's liability was limited to $10,000.00 under New Jersey law, but the doctor's liability was not. 392 F.2d at 152-3. Had the claims been tried separately, the plaintiffs may have been over-compensated or under-compensated if responsibility for the fatality were misallocated.

Some federal laws have a complementary relationship with state laws in that the state laws or remedies implicate and effectuate federal policies. For example, an action for damages for assault under state law was held pendent to a federal civil rights claim under 42 U.S.C. §1983 where the assault was in furtherance of a conspiracy to deny plaintiff his right to use a public accommodation. *Sherrod v. Pink Hat Cafe,* 250 F. Supp. 516 (N.D. Miss., 1965).

Issues of state law enacted pursuant to the theme of cooperative federalism are similarly of a complementary nature. Such state laws are certainly made to effectuate a federal purpose and are particularly appropriate subjects for the exercise of pendent jurisdiction. See e.g., *Hagans v. Levine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). In addition, many federal laws complement one another, and claims arising thereunder are obviously appropriate to be tried together when the facts so suggest.

The possibility of over-compensation, discussed above, is resolved when a court joins all proper claims and parties in order to reach a comprehensive judgment. Federal courts must also be concerned with reaching a judgment that will not be rendered "hollow" or "vacant" by a subsequent decision of a state court. A hollow judgment may occur when parties that should be before the court are not joined. See e.g., *Phelps v. Oaks,* 117 U.S. 236, 6 S.Ct. 714, 29 L.Ed. 888 (1886).

The list could go on. What is apparent is that there is no hard rule that could possibly contemplate all potential configurations of claims and parties, and there is no test that can adequately provide economy, convenience and fairness in all situations. It was for this reason that the discretionary doctrine of pendent jurisdiction evolved, to give the trier of fact discretion with which to fashion the case and provide appropriate and complete relief.

This discretion is the *sine qua non* of the judicial system as we know it. Wright, in a general discussion of the federal rules of civil procedure states it this way:

> It is not an exaggeration to say that the keystone to the effective functioning of the federal rules is the discretion of the trial court.
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> 4 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE §1029, P.129 (1969).

Exercising such discretion is particularly within the trial court's competence to accomplish. In fact, the federal rules provide the district court with considerable discretion, with the admonition that the procedural framework in which litigation is conducted promote the

ends of justice and facilitate decisions on the merits, rather than determinations on technicalities.[16]

Wright goes on to say:

> The rules will remain a workable system only as long as trial court judges exercise their discretion intelligently on a case by case basis; application of arbitrary rules of law to particular situations only will have a debilitating effect on the overall system.
>
> 4 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE §1029, P.129 (1969).

CONCLUSION

It is apparent that there is no constitutional nor statutory bar to the exercise of pendent jurisdiction over claims against nonfederal parties. In fact, there are specific and compelling reasons why this Court should allow the district court for the eastern district of Washington to exercise its discretion in this regard.

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[16]See Wright, *Id.* at 129, fn. 89

"For example, see Rules 4(h), 8(f) ("All pleadings shall be so construed as to do substantial justice"), 12(e), 13(f), 15(a) ("leave [to amend] shall be freely given when justice so required"), 15(b), 16, 21, 24, 25(d)(1), 26, 27, 28, 30(b) ("or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression"), 32, 33, 35, 37, 42 ("[the court] may make such [consolidation] orders concerning proceedings therein as may tend to avoid unnecessary costs or delay"; "[the court may order separate trials when they] will be conducive to expedition and economy"), 54, 56, 57, 65, and 84."

First, in *Moor v. County of Alameda, supra,* a California case, this Court upheld the trial courts' apparent discretionary decision to dismiss the county, and noted that in California there was a difficult state law question concerning the liability of a county. In Washington there is no such difficult question of state law. Wash. Rev. Code 4.96.010 (1967) provides that counties shall be liable for damages arising out of their tortious conduct or the tortious conduct of their officers, agents, or employees to the same extent as if they were a private person or corporation. Further, Wash. Rev. Code 4.08.120 (1973), providing for vicarious liability of counties, has legislatively abolished sovereign immunity.

Hence, there is no obstacle whatsoever to filing and prosecuting claims, based upon the tortious conduct of county employees, against the county itself. Accordingly, the only state law question added by the presence of Spokane County as a defendant is: Was the defendant treasurer acting within the scope of his employment?, a simple question of fact.

Another consideration expressed in *Moor* was the possibility of jury confusion. In the present case only one question need be answered by the jury with regard to the liability of defendant Spokane County: "If you find the individual defendant liable on any claim, was he acting within the scope of his employment (as defined in instructions) at the time the acts or omissions occurred?" There is not even a remote possibility of jury confusion. All that will be required is an instruction on the master/servant relationship and the liability flowing from it.

Finally, the *Moor* Court listed judicial economy, convenience, and fairness as considerations to be used

in weighing the trial courts' exercise of discretion. Judicial economy would best be served by leaving Spokane County in this case. There cannot be a clearer example of what the *Gibbs* opinion contemplated: The claim against the county arises out of the same "common nucleus of operative fact," and is an equal aspect of the same constitutional "case" as the claim against the county officer. In fact, the same set of facts gives rise to the claims against both defendants.

If the plaintiffs are forced to sue Spokane County in Spokane County superior court in a separate action, all of the parties, as well as both trial courts involved, will be forced to try the exact same case twice, in two different forums. The only thing different will be the named defendant in the caption of the pleadings. In addition to burdening the court system, this will result in considerable inconvenience for parties and for witnesses. They will be forced to appear once in federal court and once in county court to testify concerning the same facts. The only additional testimony in county court would be whether the defendant treasurer acted within the scope of his employment by the defendant county.

That such a procedure is less than satisfactory has been noted by courts and commentators. See e.g., Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. Cal. L. Rev. 131, (1972) which stated in pertinent part:

> "The disadvantages of such a procedure are clear. Pendent jurisdiction seems to be appropriate in such cases because both claims would normally be tried in one proceeding and would require similar factual showing. For example, to sustain a Section 1983 claim of excessive force and/or false arrest against law enforcement officers, a litigant must prove their: (1) assault and/or (2) false arrest, of him, and their (3) employment (or other investiture with power) by a state or local governmental agency. To prove his state law claims against the police officers and their public employer, the litigant must prove their: (1) assault and/or (2) false arrest, of him, and their (3) employment by a governmental entity. A litigant seemingly could conclusively demonstrate the substantial identity of his federal and his state law claims by incorporating, in *haec verba*, the allegations of his federal causes of action when setting out his state cause of action. To require parties in cases such as this to relitigate the facts of their federal law claims in state court is to make federalism a fetish rather than virtue."

Id. at 163.

Under state law, the plaintiff has a valid claim against defendant Spokane County. If Spokane County cannot be included as a party in the U.S. district court, the result would be most unfair. First, she would be subject to the practical inconvenience of trying two law-suits. Second, she would be forced to take into consideration the outcome of the first lawsuit tried, or decided on motions, when negotiating and preparing for trial in the second. Third, although Congress has, by a 100 year old statute, provided her with access to federal courts when suing on her civil rights, she would be forced to bring her entire civil rights action in Spokane County superior court, in the very same building in which the acts that gave rise to the violation occurred, and ask one agency of Spokane County, the court, to assess damages against both the County and the employee of another County agency. Fourth, if she elected to sue in the U.S. district

court first, the doctrine of collateral estoppel would operate to prejudice her in a subsequent suit against the County in superior court since various factual issues would already have been tried.

For the foregoing reasons, the petitioner respectfully urges this Court to reverse the court below and allow the U.S. district court for the eastern district of Washington the power to determine, in its discretion, if it is helpful, useful, necessary or otherwise appropriate to join the claims against the defendant Spokane County with the existing claim against the Spokane County Treasurer.

Respectfully submitted,

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